No. 89-152

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

VERA M. ENGLISH, *et al.*,

Petitioner,

v.

GENERAL ELECTRIC COMPANY, *et al.*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE THE GOVERNMENT ACCOUNTABILITY PROJECT IN SUPPORT OF PETITIONER

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INTEREST AND EXPERTISE OF AMICUS CURIAE

The Government Accountability Project (GAP), an *amicus* below, is a public interest group whose staff attorneys represent employee whistleblowers and speak on their behalf before Congress and other forums. *Amicus* works with whistleblowers to expose environmental, safety and health problems, fraud, crimes and waste of federal funds. It is a non-partisan, tax-exempt group founded in Washington, D.C. in 1977.

GAP staff members worked to win enactment of the Whistleblower Protection Act of 1989, passed unanimously by Congress and signed into law by President Bush. GAP attorneys have counselled and represented hundreds of government and corporate employees, including many with cases filed pursuant to Section 210 of the Energy Reorganization Act, 42 U.S.C. §5851. GAP has been instrumental in helping whistleblowers expose problems at nuclear powerplants, including the Zimmer (Ohio) and Midland (Michigan) plants, (with Zimmer now coal-fired and Midland now gas-fired), as well as nuclear weapons plants (among them Fernald, Ohio; Hanford, Washington; and Rocky Flats, Colorado).

GAP is filing this brief to provide the perspective of the whistleblowers who the *amicus* believes are essential to open, accountable, law-abiding business and government conduct. In the nuclear safety arena, in which this case arises, honest employee whistleblowers often make the difference between well-constructed and safely operated nuclear facilities and life-threatening ones. The United States Congress made a clear choice to provide protection for these employees - - not to limit their state law remedies. For this reason GAP is filing this *amicus* brief in support of the petitioner, Vera English.

SUMMARY OF ARGUMENT

The decision below cancels longstanding states' rights in private employment law, strips whistleblowers of significant rights and remedies, and threatens federal

law enforcement objectives involving the nuclear industry.

The nuclear industry appears to have learned little since this Court decided *Silkwood v. Kerr-McGee*, 464 U.S. 238, 258 (1984), establishing that the nuclear industry is liable under state law tort actions. Vera English's harassment and firing occurred within months of the *Silkwood* decision, a decision that placed General Electric on notice of its liability for intentional torts perpetrated against outspoken employees.

Likewise, nowhere in the expanding body of federal whistleblower statutes is there any hint of an attempt to preempt state tort actions for intentional infliction of emotional distress, or any other tort action. In numerous environmental statutes state and federal authorities share overlapping, complementary responsibilities for employee protection. Congress never demonstrated any intent to preempt tort jurisdiction of employment actions, an area traditionally regulated by the states.

Left intact, the decision below would deny states the authority to provide, and all American nuclear employees to receive jury trials, punitive damages, and other remedies currently afforded to employees in a majority of states. The decision below relies on the premise that Congress somehow sought to preempt the pre-existing or potential tort law of fifty states -- in one fell swoop without explicit or implicit indication in any statute or supporting legislative history. There is no evidence that Congress intended to strip nuclear whistleblowers of access to state law. To the contrary,

Congress recognized the importance of -- and sought to encourage -- environmental, safety and health disclosures as furthering public policy. As the Chairman of the Civil Service Subcommittee stated during debate on the 1978 Civil Service Reform Act:

> It should be public policy to encourage whistleblowing rather than chill it.

124 *Cong. Rec.* 27548 (S14280)(daily ed. Aug 24, 1978) (statement of Sen. Sasser)

The Fourth Circuit's decision in *English v. General Electric Co.*[1] unfairly turns the federal statute into a Procrustean bed, giving only one federal administrative remedy to nuclear whistleblowers in states with well-developed bodies of law for intentional infliction of emotional distress and other state law actions that can be filed against employers. This result would defeat the statutory objective, stand Congressional intent on its head, and effectively discriminate against whistleblowers, placing them at a significant disadvantage compared to similarly-situated employees. This odd result flies in the face of the long-established Congressional policy of encouraging and protecting such workers. Section 210 of the Energy Reorganization Act was intended to be a vehicle for supplementing and reinforcing accountability of the nuclear industry, not shrinking it.

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[1] *English v. General Electric Co.*, 683 F.Supp. 1006 (E.D.N.C.1988), *aff'd*, 871 F.2d 22 (4th Cir. 1989).

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION BELOW FRUSTRATES THE PUBLIC POLICY OF PROTECTING AND ENCOURAGING WHISTLEBLOWERS

Introduction

As this Court has explained, absent a specific federal statutory mandate, there are several other circumstances which make preemption necessary, -- (1) when there is pervasive federal regulation of an entire field, (*Fidelity Federal Savings & Loan Association v. DeLaCuesta*, 458 U.S. 141 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)); (2) when compliance with both federal and state regulation is impossible, (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)); or (3) when a state regulation interferes with the objective of the federal regulation (*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983)). Since Section 210 is silent on preemption, the issue turns on a finding of whether the field of employment relations is an area pervasively occupied by the federal government; simultaneous compliance with Section 210 and state law is impossible; or the state regulation interferes with the objectives of Section 210. *Amicus* submits that the federal government has not pervasively occupied the field of employment relations, as demonstrated by the fact that currently a majority of states have some form of "public policy exception" to the employment-at-will

doctrine.[2] Additionally, state tort law, far from interfering with the objectives of Section 210, in fact enhances achievement of the federal statutory goals. The Fourth Circuit's decision below would accomplish the counterproductive result of stifling disclosure.

A. Congressional Policy Uniformly Has Been To Encourage Whistleblowing as Essential for Effective Law Enforcement

Whistleblowers are courageous people who report safety, health, environmental and other hazards, and violations of criminal and civil laws by their employers.[3] Also termed "ethical resisters,"[4] whistleblowers are unique. Congress, as well as federal and state regulatory and law enforcement agencies have all relied on whistleblowers as sources of information for investigations. Whistleblowers are increasingly treated as members of an expanding group of employees protected by federal law. Quite simply they are the

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[2] *See, generally*, H. Perrit, *Employee Dismissal Law and Practice*, (1987).

[3] Kohn & Carpenter, *Nuclear Whistleblower Protection and the Scope of Protected Activity Under Section 210 of the Energy Reorganization Act*, 4 Antioch L.J. 73, 74 (1986).

[4] M. P. Glazer & P. M. Glazer, *The Whistleblowers -- Exposing Corruption in Government and Industry (1989) at 4*, coining the term ethical resister "to denote their commitment to the principles we all espouse -- honesty, individual responsibility, and active concern for the public good." In their academic study, the Glazers discuss case studies of whistleblowers, many of whom suffered severe emotional distress due to retaliation for making disclosures.

eyewitnesses upon whom effective law enforcement so often depends.

Congress, recognizing these policy objectives, has included whistleblower protection provisions in over a dozen pieces of public health, environmental and safety legislation.[5] A compelling declaration of Congressional intent in the area of whistleblower legislation is found in the Civil Service Reform Act of 1978.[6] As the Senate committee report explained:

> Often, the whistleblower's reward for dedication to the highest moral principles is harassment and abuse . . . . Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service . . . . What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses . . . . These conscientious civil servants deserve statutory

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[5] *See, e.g.*, Asbestos Hazard Emergency Response Act of 1986 (AHERA), Pub. L.99-519, §211, 100 Stat. 2970 (to be codified at 15 U.S.C. §2641); Clean Air Act (CAA), Pub. L. 95-95, 42 U.S.C. § 7622 (1982); Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §601 (1982); Department of Defense Authorization Act of 1987 (DOD87), Pub. L. 99-661, §42, 100 Stat. 3816 (to be codified at 10 U.S.C. §409); Safe Drinking Water Act, 42 U.S.C. § 300j-9; Water Pollution Control Act, 33 U.S.C. §136; Toxic Substances Control Act, 15 U.S.C. § 2622.

[6] Civil Service Reform Act, Pub. L. 95-454, 92 Stat.1111 (codified as amended in various sections of Title 5 of the United States Code).

protection rather than bureaucratic harassment and intimidation.[7]

Legislative attention to incorporate employee protection provisions within statutes followed the 1969 Farmington mine disaster. Safety reforms were enacted for the mining industry in the ensuing Coal Mine Health and Safety Act, which established protections for miners who report safety problems to the government or their employer. *See, Phillips v. Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975).

Provisions adopted later in other health and safety laws were patterned after the mine safety legislation. Consequently, the agency responsible for the interpretation of many of these separate employee protection provisions interprets them "in a parallel manner." *Willy v. Coastal Corp.*, 85-CAA-1 at 4, Decision and Order of Remand of the Secretary of Labor (June 4, 1987); *see, also*, 29 CFR § 24.2, which interprets Section 210 in the same manner as the provisions contained in several environmental statutes. The reason Congress has protected whistleblower employees through federal statutes is clearly "to encourage reporting." *Munsey v. Federal Mine Safety & Health Review Comm.*, 595 F.2d 735, 743 (D.C. Cir. 1978). This legislative goal is essential to understanding why maintaining state torts *enhances* federal regulatory goals, and why the Fourth Circuit's position *frustrates* it. Encouraging employees to report problems is

[7] Senate Report No. 95-969 as reported in 1978 *U.S. Code Cong. and Ad. News*, at 2730.

essential to enforcement of federal law.

In fact, in February 1990, the American Bar Association House of Delegates voted to support federal whistleblower legislation similar to Section 210 for all private sector workers reporting safety, health and environmental problems, as well as any violation of federal statute or regulation.[8]

[8] As the proponents of the ABA resolution successfully argued:

> It is in the interest of all employers as well as employees to protect "whistleblowers." It is often the case that only "whistleblowers" have the courage to carry bad news to executive suites, while middle-level managers who may wish to protect their jobs will not inform senior management of developing problems. Since safety and health threats can also threaten corporate futures and profits with civil liability and unfavorable publicity, it is also in the interest of stockholders and corporations to keep the lines of communication open to information from employees who are intimately familiar with company shortcomings.
>
> The recent examples of corporations in Bankruptcy Court as a result of tort liability for products that threaten safety and health clearly make the need for protecting corporate employees more urgent than ever.

See e.g., p. 2 of the Report and Recommendation to the ABA House of Delegates accompanying Resolution 125 from the Young Lawyers Division, National Conference of Administrative Law Judges, and Section of Individual Rights and Responsibilities, in Volume II Reports with Recommendations to the House of Delegates, 1990 Midyear Meeting (not sequentially paginated).

According to the legislative history, Section 210 of the Energy Reorganization Act was patterned after the Clean Air Act, 42 U.S.C. §7622 (1988), the Federal Water Pollution Control Act, 33 U.S.C. §1367 (1988) and the Federal Mine Safety and Health Act, 30 U.S.C. §815(c)(1988). *See*, 1978 U.S. Code Cong. & Ad. News 7303. The legislative history emphasizes the desire of Congress to ensure employee input and protection:

> The best source of information about what a company is actually doing or not doing is often its own employees and this amendment will ensure that an employee could provide such information without losing his job or otherwise suffering economically from retribution from the polluter.

Legislative history of the Federal Water Pollution Control Act cited in Conference Report of Clean Air Act, 1977 *U.S. Code Cong. & Ad. News,* 1077, 1404.

In an age where limited agency resources produce desuetude by default -- government inability or refusal to enforce many health and safety laws -- reliance on employees for quick reliable information is an efficient and effective means to ensure compliance and enforcement.

B. Whistleblower Protection Legislation Is Remedial and to be Liberally Construed

The Fourth Circuit clearly was wrong to hold that Section 210's federal scheme would be frustrated by

pursuing state law remedies. Section 210 of the Energy Reorganization Act, 42 U.S.C. §5851, passed in 1978, was Congress' effort to provide a national standard of minimum protection for nuclear workers in all states who expose problems potentially affecting the public health and safety. As demonstrated below, Congress never intended to deny these courageous employees the traditional state court remedies afforded all citizens. Clearly, Congress meant to protect, and thus to encourage, workers who report threats to public health and safety.

The most effective way to prevent whistleblowing disclosures would be to cancel existing remedies for whistleblowers, who risk career martyrdom when they report illegalities. Employers too often retaliate against whistleblowers by discharging, demoting, blacklisting, transferring, or isolating them.[9] Fear of reprisal is a powerful reason why would-be whistleblowers remain silent.

As a result, consistent with public policy objectives, Section 210 and the whistleblower statutes generally are remedial and to be liberally construed. *See e.g., Brock v. Roadway Express*, 481 U.S. 252 (1987). Representative William D. Ford (D.Mich), in offering an amendment to the Federal Water Pollution Control Act employee protection provision, reinforced this view:

> Mr. Chairman, in offering this amendment *we are only seeking to protect workers* and

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[9] *See*, M. Glazer & P. Glazer, *The Whistleblowers -- Exposing Corruption in Government and Industry* (1989) at 3.

> communities from those very few in industry who refuse to face up to the fact that they are polluting our waterways, and who hope that by pressuring their employees and frightening communities with economic threats, they will gain relief from the requirement of any effluent limitation or abatement order. [Emphasis added].

118 *Cong.Rec.* 10,766-768 (1972) reprinted in *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 655.

The remedial construction of Section 210 is evident in its statutory language.[10] Remedial statutes are defined as those "which provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries." Sands, *Sutherland Statutory Construction*, Sec. 60.02, (4th Ed. 1986). This definition is clearly in keeping with this Court's holding in *California v. ARC America Corp.*, 109 S.Ct. 1661 (1989). At issue was the state tort remedy which provided for relief in addition to that of the federal statute.[11] Further Sutherland states that

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[10] Section 210 expressly authorizes the Secretary of Labor to file in Federal District Court a civil action enforcing reinstatement orders of whistleblowers. The district court in such an action "shall have jurisdiction to grant all appropriate relief . . . . " 42 U.S.C. Sec. 5851(d)

[11] The court held that a state tort remedy which provides relief that is in addition to that provided by a federal statute cannot be a basis for the conclusion that the state tort remedy has been preempted. *California v. ARC America Corp.*, 490 U.S. --- ; 104 L.Ed.2d 86 (1989). *See also, Pacific Gas and Electric*, 461 U.S. 190, 212-13 (1983), and *Silkwood v. Kerr-McGee*, 464 U.S. 238, 248 (1984).

"[r]emedial statutes are liberally construed to suppress the evil and advance the remedy." Sands, *supra* at Sec. 60.01. This Court additionally has held that the goal of judicial construction is to effect the intent of the legislature in promoting nondiscriminatory employment practices. *General Electric v. Gilbert*, 429 U.S. 125 (1976).

Section 210 of the Energy Reorganization Act while well-intentioned is, by itself, a woefully inadequate remedy as a vehicle to encourage and protect employees who make important disclosures. This line of reasoning led to the rejection of the preemption theory by at least one district court. *Gaballah v. PG&E*, 711 F.Supp. 988, 990 (N.D. Cal 1989). The federal government does not occupy the field of whistleblower protection, as states also act to protect whistleblowers. At least ten states have statutory exceptions to the common law rule of employment at will for private workers.[12] Congress is aware of this fact, and it is apparent from the limited remedy afforded.

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[12] *See*, Cal. Lab. Code Ann. §1102.5 (West Supp. 1989); Cal. Gov't. Code §§10540-10551 (West 1980); Conn. Gen. Stat. Ann. §31-51m (West Supp. 1988); La. Rev. Stat. Ann. §30:2027 (West 1987); Me. Rev. Stat. Ann. tit. 26 §§831-40 (1988); Minn. Stat. Ann. §§ 181.931-.935 (West Supp. 1989); Mont. Code Ann. §§39-2-901 to -914 (1987); N.J. Stat. Ann. §§34:19-1 to -8 (West 1988); N.Y. Lab. Law §740 (McKinney 1988); Pa. Stat. Ann. tit. 43, §§1421-28 (Purdon Supp. 1988).

In particular, Section 210 has a Draconian 30-day statute of limitations, which the Secretary of Labor interprets harshly.[13] Section 210 does not provide for punitive or exemplary damages, does not involve a jury, does not allow for full discovery rights, and is given limited review by a Court of Appeals. The advantages of the statute to whistleblowers is its purported speedy and inexpensive remedy.[14]

Furthermore, Congress did not create any new, special administrative body that would support an inference that 42 U.S.C. §5851 was intended to be the exclusive means of enforcing the ERA. Instead, the

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[13] This is nowhere more true than in the present case, where the Petitioner filed a complaint with the Department of Labor, went through a hearing and received a favorable judgment, only to have that result thrown out by the Secretary of Labor on the basis of an untimely filed complaint. The Petitioner had filed a complaint after her layoff, as opposed to her transfer by the company which did not affect her salary or benefits. In our view, the Petitioner relied, to her detriment, upon the good faith representations of the company to find her other work. By finding that such employees must file a complaint within thirty days of any act that could possibly be construed as discriminatory encourages, even necessitates, a flood of premature complaints.

[14] The alleged advantage of expedited judgments is overstated. Most complaints that survive initial actions to dismiss take far more than the statutorily mandated 90 days to resolve. A study of timeliness for Labor Department litigation in the 275 whistleblower cases between fiscal years 1982 and 1989 revealed that the agency failed to meet the statutory deadline for resolving such cases in a large percentage of cases, sometimes by as much as 800 days and more. *See*, 134 Cong. Rec. S1447 (daily ed. Feb. 25, 1988)(Testimony of the Government Accountability Project at 103, 109).

agency designated to enforce Section 210, the Department of Labor, also resolves a myriad of other labor disputes and was in existence well before the passage of Section 210.

Consequently, no interference with the nuclear regulatory scheme is evident from permitting states to exercise their traditional right to regulate the employer-employee relationship. To rise to the level of completely eliminating a state's right to regulate the employment relationship, the federal regulation would have to be truly pervasive. *Bush v. Lucas*, 462 U.S. 367 (1983). Even where comprehensive legislative schemes have been put in place to regulate labor and management relations, state tort actions against the employer for damages arising out of the employment relationship have been permitted. *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399, 108 S.Ct. 1877 (1988).

C. Congress Did Not Intend to Shrink Whistleblower Remedies

The central issue for whistleblowers is whether in passing Section 210, Congress intended to encourage disclosures by expanding protections, or discourage dissent by shrinking employee rights. There is simply not a scintilla of evidence -- only speculation -- that Congress intended Section 210 to be substitutive, not additive. By determining that a comprehensive federal scheme existed in 42 U.S.C.§5851, thereby barring any state claim lest frustration of the federal policy occur, the court below failed to consider the fundamental

purpose of these sections -- further protection of the employee against retaliatory discrimination. The legislative history of Section 210 demonstrates the clear and manifest intent of Congress to increase employee protection. Senate Report No. 95-848, 95th Cong., 2d Sess.29, reprinted in 1978 *U.S. Code Cong. & Ad. News 7303*. Further, the Fourth Circuit conceded this fact. *English v. GE*, 683 F. Supp. 1006, 1012-13 (E.D.N.C.1988) *aff'd per curiam*, 871 F.2d 22 (4th Cir. 1989).

It would hardly enhance employee protection for Congress to eliminate state-based rights under tort law providing for jury trials and punitive damages. As Chief Justice Rehnquist has written, our Founding Fathers considered the right to jury trial "an important bulwark against tyranny and corruption." *Parklane Hosiery v. Shore*, 439 U.S. 322, 343-44 (1979)(Rehnquist, J., dissenting). Since the right to a jury trial is a cornerstone of common law and state constitutions, Congress would not have lightly abolished American citizens' rights to jury trials in fifty states without debate, *sub silentio*.[15]

Neither would Congress have lightly abolished the right to punitive damages in appropriate cases. In this case, two different legislatures exercised their discretion

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[15] The tort of intentional infliction of emotional distress is a question of state and not federal law. Further, it is clear that the tort of wrongful discharge is an area equally subject to state regulation. *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877, 100 L.Ed. 410 (1988)(wrongful discharge is a state tort remedy, within the traditional police powers of the states).

not to foreclose plaintiffs' rights to punitive damages (as well as to jury trials): the U.S. Congress and the North Carolina state legislature. The United States Congress did not exercise its power of federal preemption. The North Carolina legislature and its state courts have likewise declined to adopt an exclusive remedy rule in cases of federal administrative remedies. Yet the courts below, acting as a "super-legislature," abused their discretion to do what the two legislatures declined to do.

The state of North Carolina had the chance to abolish the application of its tort of intentional infliction of emotional distress to whistleblowers protected by Section 210 and other federal laws. North Carolina has done nothing to diminish these rights to tort actions and jury trials, although it was within its sovereign powers.[16] North Carolina has a powerfully compelling state interest in allowing for jury trials and punitive damages. As General Electric has demonstrated in its

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[16] Other states have exercised their discretion to adopt exclusive remedy rules; *see e.g.*, *Walsh v. Consolidated Freightways* 278 Or. 347, 351-53, 563 P.2d 1205, 1208-09 (1977)(no tort because OSHA remedies adequate to protect interests of employee and society); *Corbin v. Sinclair Mktg.*, 684 P.2d 265, 267 (Colo Ct. App. 1984)(Colorado public policy exception to "employment at will" does not apply to employees with statutory remedy); *Gyzb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985)(aggrieved party limited to statutory remedy); *Salazar v. Furr's*, Inc., 629 F. Supp. 1403, 1409 (D.N.M. 1986)(no claim for relief for wrongful discharge where another remedy provided by statute); *Allen v. Safeway Stores*, 699 P.2d 277, 284 (Wyo. 1985)(no need for court-imposed tort action if another remedy exists).

brief, the availability of punitive damages can be a powerful incentive to comply with the law, and a useful tool for courts to accomplish the same goal. The principle was first recognized in the time of George III, when punitive damages were allowed to punish abuse of authority. *Huckle v Money*, 95 Eng.Rep. (K.B.1782).

Juries are permitted to award punitive damages based on the defendant's culpable state of mind or abuse of power. Dobbs, *Remedies* (1973) at 204-6. In North Carolina, punitive damages are allowed in cases of "malicious, wanton and reckless" actions and "reckless and criminal indifference to [plaintiff's] rights." *Cotton v. Fisheries Products Co.*, 181 N.C. 151, 106 S.E. 487 (1921).

The district court reasoned that since two other whistleblower protection laws (15 U.S.C. §2622(b)(2)(B) and 42 U.S.C. §300j-9(i)(2)(B)(ii)) contained punitive damage award provisions, and therefore Congress "reached an informed judgment" that in "no circumstances should a nuclear whistleblower receive punitive damages." *English v. GE*, 683 F.Supp. 1006 (E.D.N.C. 1988). This ignores the reality that development of whistleblower legislation by Congress has been a piecemeal project, with particular industries or substantive areas of concern addressed *ad hoc*, one at a time. Congress has been inconsistent in adopting whistleblower legislation. The consultant to the Administrative Conference of the United States wrote:

> Over a dozen federal laws attempt to protect whistleblowers from retaliation in wide areas of private sector activity

> where health and safety are at stake. These laws, which protect both public and workplace health and safety interests . . . have created a crazy quilt of investigative, adjudicatory and review responsibilities . . . . These discrepancies reflect vagaries of the legislative process -- legislation has addressed various industries on an incremental or piecemeal basis over time ...

Eugene R. Fidell, "Federal Protection of Private Sector Health and Safety Whistleblowers," 2 *Administrative Law Journal* 1, 2,4 (1988).

The Administrative Conference of the United States in reviewing federal whistleblower protection concluded that "this lack of uniformity does not appear to be reasoned, but most likely reflects the incremental enactment of the various statutes over a period of years." 1 C.F.R. § 305.87-2.[17]

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[17] As the advocates of the ABA resolution on whistleblower protection argued to the ABA House of Delegates:

> Current federal law, a series of scattered provisions, is confused and inconsistent; this happened largely because Congress adopted the employee protection statutes one at a time. These procedural complexities would be eliminated with passage of the omnibus bills now proposed, which follow recommendations made by the Administrative Conference of the United States (ACUS).

(continued...)

Congress' omission of punitive damage awards in Section 210 does not indicate any intent to preempt punitive damages under state law, only an inconsistency among whistleblower statutes fraught with inconsistencies, universally criticized by commentators and the focus of current legislative initiative. A minor inconsistency is hardly the stuff of which federal preemption is hewn, particularly when preemption would adversely affect rights of citizens who happen to be nuclear workers in fifty states.

Several pieces of legislation have been introduced in recent years marking a concerted effort by Congress to enhance the protections afforded to employees in the private sector when they report on matters within their employment that may affect public health and safety. These initiatives are in large part the result of recommendations of the Administrative Conference of the United States (ACUS) and the recognition that employees in important industries such as aviation, food processing, nuclear weapons, health care, and others have no minimum federal protection in place to protect them when they seek to report problems within those industries.

One of the first bills designed to address the issue of across the board minimum federal protection for all private sector employees was the Uniform Health and Safety Whistleblowers Protection Act. Introduced as

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[17](...continued)
Report and Recommendation to the ABA House of Delegates accompanying Resolution 125, *supra*, footnote 8 at 3.

S.2095, the overall purpose of the bill was described by Senator Howard Metzenbaum, (D.Ohio):

> Private sector employees should feel free to report illegal or improper activities that endanger the public health or safety without fear of personal reprisal. It is a fundamental principle of good Government to encourage citizens to report illegal activities to the proper authorities. Especially when public health and safety is at stake, individuals who are willing to report unlawful, hazardous practices to avert a disaster should be honored as heroes. Instead, in too many cases, their reward is to be fired, harassed, demoted, or blacklisted by their employers.

134 Cong. Rec. S1447 (daily ed. Feb. 25, 1988)(statement of Sen. Metzenbaum). Notably, S.2095 sought also to clairfy the very issue being addressed by this Court today. In Section 8(a) drafters of the bill emphasized that the remedies provided would not preempt state law remedies. Instead, the remedies provided would seek to supplement state-based rights and remedies.

Most recently, bills have been introduced in both Houses of Congress again designed to provide wide spread minimum protections for private sector employees. This proposed legislation (S.436 introduced in the Senate and H.R. 3368 introduced in the House) is entitled the Employee Health and Safety Whistleblower Protection Act. In his statement before the Senate Subcommittee on Labor, Senator Charles Grassley, (R.Iowa) a co-sponser of S.436 stated:

Mr. Chairman, as you know....during my service in the Senate I have championed the rights of Whistleblowers who disclose waste and fraud in the Federal Government. My work has led me to conclude that whistleblowers perform a valuable public service. Without their disclosures, we would not begin to know where to find waste and inefficiency.

Whistleblowers face enormous obstacles in their efforts to expose waste and correct that wrongdoing. Our system rewards these employees with the most unfair prizes- like discharge, demotion, and unwanted transfers. They risk their careers as well as reputations in the interest of honest Government, and they do so reluctantly.

* * * * * * * *

So, Mr. Chairman, in summary, the employees who bring health and safety violations to public light deserve our thanks. At a minimum we need to ensure their careers are secure. This bill sends an important message to employers, employees, and the American public at large: Violations of health and safety standards, like Federal waste and fraud, will not and cannot be tolerated. And we need to rely on courageous employees to help us make sure that Federal standards are met.

Testimony of Senator Charles Grassley before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 101st Congress, March 7, 1989, pp. 37-39.

Again, S.436 and S.2095 attempt to rectify the unwarranted confusion in the courts on the issue of federal preemption by specifically indicating that the bills will supplement not supplant state based rights and remedies. *See*, Section 8(b) of S.436 and H.R. 3368.

"All laws should receive a sensible construction," avoiding "injustice, oppression, or an absurd consequence." *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87 (1869). With neither legislative history nor statutory language hinting at any intent to abolish either the process of jury trials, or any state law remedies, it would be "absurd" to assume that Congress would have intended such "injustice [and] oppression." *Id.* Jury trials and punitive damages vindicate individual rights and are important safeguards of the liberty of the individual. "The liberty of the individual must be scrupulously protected .... no rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences." *United States v. Brown*, 333 U.S. 18, 27 (1947). Denying employees their right to jury trials in state court actions is "not within [the law's] spirit, nor within the intention of its makers." *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

In sum, the groundswell for whistleblower protection gained momentum once Congress took affirmative steps to shield employees in the mine industry in 1968. *See*, M. P. Glazer & P. M. Glazer, *The Whistleblowers* --

Exposing Corruption in Government and Industry (1989) at 65-66. In its infancy, federal whistleblower protection naturally developed slowly and cautiously. It has developed to the point where generic legislation to protect all private sector safety, health and environmental whistleblowers is pending in Congress. S. 436; H.R. 3368 (101st Cong., 1st Sess.). Those bills explicitly provide that there is no federal preemption of state remedies, making clear Congress did not intend to wipe out state law liability.

D. Case Law Supports a Finding of No Preemption

This analysis is consistent with the prevailing trend of case law deciding whether federal whistleblower statutes preempt state remedies. State and federal remedies are complementary, not conflicting. For instance, in the FMSHA, 30 U.S.C. §815(c)(1988), two courts have addressed the issue. In *Wiggins v. Eastern Associated Coal Co.*, 357 S.E.2d 745 (W.Va.1987) the West Virginia Supreme Court found that the whistleblower protection codified in the statute was inadequate as a matter of law, and therefore did not preempt state remedies. *But see*, *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984)(FMSHA was adequate, so preemption found).

One court has held the Clean Air Act (CAA) whistleblower provision, 42 U.S.C. §7622 (1988) does not preempt state tort suits. *Phipps v. Clark Oil and Refinery Co.*, 396 N.W.2d 588 (Minn.Ct.App. 1986) *aff'd* 408 N.W.2d 569 (Minn. 1987). In *Phipps*, the CAA whistleblower protection provision was found not to

preempt state law claims in that state law simply advanced the declared Congressional purpose of protecting employees from retaliatory discharges.

Section 210 cases reach similar holdings. In *Wheeler v. Caterpillar Tractor Co.*, 108 Ill. 2nd 502, 485 N.E.2d 372, 376 (Ill. 1985) *cert. denied*, 475 U.S. 1122 (1986), the court held that there was no preemption because Congress in enacting Section 210, did not intend such a result. *Also see*, *Gaballah v. PG&E*, 711 F.Supp. 988 (N.D. Cal 1989), finding Section 210 does not bar a state court action based on state law, as "[t]here is no apparent reason why Congress should have wanted to bar persons who complained about safety violations from a jury trial and the recovery of punitive damages but not to bar persons who suffered injuries from those violations." 711 F. Supp. at 990. *Accord*, *Norris v. Lumbermen's Mut. Casualty Co.*, 881 F.2d 1144, 1151 (1st Cir. 1989)("no good reason for barring state remedies to whistleblowers" but "allowing punitive damages under state law" to those injured in nuclear accidents that might not have occurred if whistleblower's complaints had been investigated"). *But see*, *Chrisman v. Phillips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140 (1988).

Clearly Section 210 is an elective remedy afforded by Congress and not meant to be all-encompassing. *Stokes v. Bechtel N. Am. Power Corp.*, 614 F. Supp. 732,744 (N.D. Cal. 1985)(Section 210 supplements state protection for nuclear whistleblowers).

The Department of Labor is the agency with

expertise in Section 210 complaints; the Department of Labor has also held that the Section 210 remedy is not an exclusive remedy, and that there is no federal preemption of state law tort suits. This is evidenced by the Secretary of Labor's ruling that dismissal of a Section 210 complaint should be without prejudice, so that such a dismissal will not preclude a state court action. *See, e.g., Nolder v. Ramond Kaiser Engineers, Inc.*, No. 84-ERA-5 (D.O.L., June 28, 1985).

This Court defers to the reasonable interpretation of the agency to which Congress has delegated authority. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984)(considerable weight should be accorded to an executive department's construction of a statute it is entrusted to administer.) *See also*, *United States v. Turkette*, 452 U.S. 576, 580 (1980); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *McLaren v. Fleischer*, 256 U.S. 477, 480 (1921). As this Court held in *Udall v. Talmann*:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.

380 U.S. at 16 (1965). *Amicus* respectfully asks this Court to give such deference to the view of the Solicitor of the Department of Labor, who has filed a brief in support of the Petitioner, Vera English.

CONCLUSION

If Vera English had been subjected to the type of outrageous behavior alleged in her complaint in a non-nuclear portion of GE's Wilmington, North Carolina plant, there would be no question but that she could proceed in state court to vindicate her rights. As Petitioner aptly states in her brief, intentional infliction of emotional distress is a matter properly regulated by the state in order to preserve civilized relations among its citizens, and to punish wrongdoers. It would indeed be ironic if, simply by virtue of an employee performing the public service of reporting unsafe nuclear conditions, that employee were deprived of her rights. It would not take long for that type of interpretation to defeat Congress' intent of encouraging disclosures.

Moreover, the rights and interests of a state in protecting the economic interests of its citizens will be better served by allowing it to encourage reporting of safety problems through maintaining remedial protections. It is up to the Congress, not the courts, to "rethink the division of regulatory authority" and to

decide whether state remedies provided for employees covered by the ERA "undercut[s] a federal objective." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190, 223 (1983).

Respectfully submitted,

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